IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 12, 2008 Session

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA as subrogee of SMITH MECHANICAL CONTRACTORS, INC. v. LAWYER'S TITLE INSURANCE CORPORATION, ET AL.

Appeal from the Chancery Court for Washington County
No. 35760 Richard Johnson, Chancellor

No. E2007-01138-COA-R3-CV - FILED MAY 6, 2008

Travelers Casualty & Surety Company of America ("Travelers") as subrogee of Smith Mechanical Contractors, Inc. ("Smith Mechanical") sued Lawyer's Title Insurance Company ("Lawyer's Title") and First Tennessee Bank National Association ("the Bank") seeking, among other things, a judgment declaring a mechanic's lien filed by Smith Mechanical to have priority over a deed of trust held by the Bank with regard to real property located in Johnson City, Tennessee. Lawyer's Title and the Bank filed a motion to dismiss or for summary judgment. After a hearing, the Trial Court entered an order finding and holding, *inter alia*, that Travelers' complaint was barred under the doctrine of *res judicata*; that the complaint was barred under the compulsory counterclaim rule; that Travelers never acquired Smith Mechanical's mechanic's lien rights; and, that the Bank had recorded a payment bond ("Performance Bond"), which operated to discharge Smith Mechanical's lien from the real property. Travelers appeals to this Court. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

William T. Alt, Chattanooga, Tennessee for the Appellant, Travelers Casualty & Surety Company of America as subrogee of Smith Mechanical Contractors, Inc.

P. Edward Pratt, Knoxville, Tennessee for the Appellees, Lawyers Title Insurance Corporation and First Tennessee Bank National Association.

OPINION

Background

This case, which has a very complex factual and procedural history, involves issues which were before this Court in *Smith Mech. Contractors, Inc. v. Premier Hotel Dev. Group*, 210 S.W.3d 557 (Tenn. Ct. App. 2006) ("*Smith Mech.*"). In order to provide background necessary to our consideration of the issues before us in the current appeal, we begin by quoting extensively from *Smith Mech.*:

> This lawsuit involves the building of the Carnegie Hotel (the "Hotel") in Johnson City, Tennessee. The Hotel was owned and built by Premier Hotel Development Group and Premier Investment Group ("Premier"). The general contractor was Barker Building. The mechanical subcontractor utilized by Barker Building was Smith Mechanical Subcontractors, Inc. ("Smith Mechanical"). The land on which the hotel was built was owned by the City of Johnson City ("Johnson City").
>
> One of Premier's principals was Sam Easley ("Easley"). Easley initially utilized a personal line of credit with the Bank to fund a portion of the construction. Easley's personal line of credit was not secured by the Hotel property. As construction proceeded, Easley sought additional construction funding from the Bank. Before the Bank would loan any funds for further construction of the Hotel, the Bank insisted that Barker Building would have to execute a Subordination Agreement subordinating its lien rights to a deed of trust to be filed by the Bank once it loaned the money.
>
> Barker Building's President is Robert Feathers ("Feathers"). When Feathers was approached about entering into a Subordination Agreement, he understood the agreement would subordinate Barker Building's lien rights to the Bank's deed of trust. Feathers, however, was uncertain the effect such an agreement would have on the lien rights of the various subcontractors. Due to this uncertainty and because he wanted to ensure that the subcontractors were paid, Barker Building obtained a $4 million Performance Bond to cover any potential claims of the subcontractors before it executed the Subordination Agreement. The Performance Bond was issued by Travelers.
>
> Another relevant event is how the closing for the Subordination Agreement happened. The attorney who drafted the pertinent documents and otherwise handled the closing was Cynthia Kessler from the law firm of Hunter, Smith & Davis, L.L.P. ("H, S & D"). Feathers was familiar with H, S & D because that firm had represented Barker Building and/or Feathers. H, S & D also had done legal work for the Bank and Premier. According to Feathers' affidavit, when he was contacted by attorney Kessler regarding the closing, Feathers was surprised that law firm was handling the closing

as they represented the various parties on other matters. Feathers stated that Kessler told him that H, S & D had been retained because of the relationship it had with all three parties and with that law firm as the closing agent, the loan should close quickly. In his affidavit, Feathers stated that because H, S & D had represented him and/or Barker Building and because that firm was handling the closing, he believed that "Ms. Kessler's interests were my interests and that she would not allow Barker Building to be harmed in the closing." According to Feathers, Kessler assured him that there was plenty of money available from the loan proceeds to pay for the completion of the Hotel. Feathers claims that in reliance on this assurance, he obtained the Performance Bond and then executed the Subordination Agreement which subordinated Barker Building's lien rights to the Bank's deed of trust.

This lawsuit began with the filing of a complaint by subcontractor Smith Mechanical on August 30, 2000. Smith Mechanical sued Premier, Barker Building, the Bank, K. Newton Raff[1], and Johnson City. Smith Mechanical claimed it was owed $979,282.71 for work performed on the Hotel. Smith Mechanical essentially sought to enforce a mechanics and materialmen's lien on the property. In the alternative, Smith Mechanical sought $979,282.71 based on the theory of unjust enrichment. Smith Mechanical sued the various defendants because each had an interest in the property, but the crux of its claims were against the general contractor, Barker Building, and the owner, Premier.

FOOTNOTES

1. Raff is the Trustee on First Tennessee Bank's Deed of Trust which secured the Hotel property. For ease of reference only, for the remainder of this Opinion we will refer to First Tennessee Bank and Raff collectively as the Bank.

Barker Building also was owed money by Premier. Even though Barker Building had entered into the Subordination Agreement, it took steps to attempt to perfect a mechanics and materialmen's lien against the property in the amount of $3.6 million.[2] Barker Building needed to perfect its lien because it intended to claim the Subordination Agreement was invalid because it was procured by fraud. Barker Building then filed a cross-claim and a third party complaint seeking the $3.6 million it was owed, plus interest. Barker Building cross-claimed against Premier, Johnson City, and the Bank. Barker Building filed a third party complaint against the general partners of Premier, which included Premier Investment Group, Easley Family Limited Partnership, Samuel T. Easley, and Christopher Hannah.

FOOTNOTES

2. This amount was later reduced after Barker Building received partial payment.

Prior to Barker Building's filing its cross-claims and third party claims, Barker Building and Premier entered into a tentative settlement agreement. Because Smith Mechanical was negotiating its own settlement, the settlement agreement between Barker Building and Premier did not affect Smith Mechanical's claims. In any event, Barker Building agreed to settle for $2,107,000, which it claims was sufficient to pay only the subcontractors. The settlement agreement was conditioned upon the happening of two events: (1) the subcontractors (excluding Smith Mechanical) agreeing to settle for the amount set forth in the settlement agreement; and (2) Smith Mechanical reaching its own agreement to settle with Premier and then releasing its claims against Barker Building and its surety on the Performance Bond, i.e., Travelers. When Premier was unable to settle all claims with Smith Mechanical and, in turn, was unable to obtain a release for Barker Building and Travelers, Barker Building filed the cross-claims and third party complaint claiming, among other things, that the settlement agreement was null and void. Barker Building essentially brought claims against Premier based on breach of contract and for enforcement of a materialmen's lien. Barker Building also brought claims for intentional and/or negligent misrepresentation and/or fraud against the Bank, Premier, and Easley based on the events referenced above surrounding the closing of the Subordination Agreement.

The Bank asserted as one of its defenses that Smith Mechanical's lien was subject to being bonded off by the Performance Bond issued by Travelers. The Bank, as a third-party plaintiff, sued Travelers as a third-party defendant, seeking indemnity pursuant to the Performance Bond.

Barker Building and Travelers then filed a separate lawsuit, the second lawsuit, against the Bank and the Washington County Register of Deeds seeking injunctive relief. Barker Building and Travelers claimed that the Bank had improperly filed a "Bond for Release of Lien" which relied on Travelers' Performance Bond to release any liens. After filing the Bond for Release of Lien, the Bank intended to sell the Hotel free of any liens which it claimed would have to be paid by Travelers. Barker Building and Travelers sought an injunction ordering the allegedly improperly filed Bond for Release of Lien be removed from the official records of the Register of Deeds. Barker Building and Travelers also sought an injunction preventing the sale of the Hotel free from any liens or, if the Hotel was sold, that an order be entered requiring the money to be held in escrow "pending a full and complete hearing of the merits of the claims of the plaintiffs."

Premier filed for bankruptcy at some point. In November of 2001, the Bankruptcy Court entered an Order lifting the automatic stay "in order to allow the parties to proceed to judgment in the state court action. Enforcement of any judgment rendered against the debtors … or against the property of the estate shall remain subject to the automatic stay provisions…." Less than one month later, the Bankruptcy Court modified its Order to the extent that it specifically ordered the sale

of the Hotel to go forward and ordered the Bank to advertise the sale of the property, etc. When the separate second lawsuit for injunctive relief filed by Barker Building and Travelers came up for a hearing, the parties acknowledged that the request for an injunction stopping the sale of the Hotel essentially was preempted by the Bankruptcy Court's order. Barker Building and Travelers proceeded with their request for an injunction to have the "Bond for Release of Lien" removed from the County's records. The Trial Court denied this request on the merits and dismissed the separate second lawsuit altogether, stating the requirements of Tenn. R. Civ. P. 65 had not been met. No appeal was taken from the order dismissing this separate second lawsuit.

On February 4, 2002, the Bank filed two of three dispositive motions, all three of which are at the heart of this appeal. The Bank filed: (1) a motion to dismiss Barker Building's claims based on a failure to properly perfect its materialmen's lien, to dismiss the fraud action due to that claim being moot because the lien was not properly perfected, and to dismiss the claims based on the Statute of Frauds; and (2) a motion to dismiss and/or motion for summary judgment seeking to dismiss the claims of Smith Mechanical based on the effect of Travelers' Performance Bond. The Bank later filed a third motion to dismiss the claims of Barker Building, asserting those claims were barred by the doctrine of *res judicata* and because Barker Building failed to plead fraud with particularity.

The Trial Court denied the Bank's motion for summary judgment as to the claims advanced by Smith Mechanical. As pertinent to this appeal, the Trial Court then dismissed Barker Building's and Travelers' claims against the Bank for the following reasons: (1) Barker Building failed to timely perfect its materialmen's lien; (2) without a valid lien, Barker Building's claim for misrepresentation and/or to rescind the Subordination Agreement became moot; (3) the doctrine of *res judicata* barred "all claims" by Barker Building and Travelers against the Bank; and (4) Barker Building's cross-claim failed to allege fraud in the particularity as required by Tenn. R. Civ. P. 9.02.

The Trial Court later stated two additional reasons to dismiss the misrepresentation claim against the Bank concerning the closing conducted by attorney Kessler. First, the Trial Court concluded that to the extent Barker Building relied on the statements of Kessler, it was relying on the statements of its own attorney rather than the Bank's attorney, thereby negating an essential element of a misrepresentation claim. Second, the Trial Court determined that a dual agency relationship existed with Kessler and the parties to the Subordination Agreement, and that this dual agency barred imputing any alleged misrepresentation to the Bank.

After the Trial Court ruled that *res judicata* barred Barker Building's and Travelers' claims against the Bank, the Bank moved to have Travelers substituted in its stead as the party defendant for the claims advanced by Smith Mechanical. The

Bank argued that *res judicata* barred Travelers from asserting any defense to its obligation under the Performance Bond. The Trial Court granted this motion and substituted Travelers as the party defendant with regard to the claims advanced by Smith Mechanical. These particular claims between Smith Mechanical and Travelers eventually were resolved and an Order of Compromise and Dismissal was entered.

Barker Building and Travelers now appeal the dismissal of their claims against the Bank. Barker Building and Travelers claim: (1) the Trial Court erred when it concluded that *res judicata* barred all of their claims against the Bank; (2) the Trial Court erred when it concluded Barker Building and/or Travelers failed to state a claim for misrepresentation; and (3) the Trial Court erred when it dismissed the fraud claim because that claim was pleaded with sufficient particularity as required by Tenn. R. Civ. P. 9. Barker Building also argues that the Trial Court erred when it concluded that there was a dual agency relationship between Kessler, Barker Building, and the Bank, and that this dual agency barred imputing any alleged misrepresentation to the Bank.

The Bank raises two additional issues on appeal. These two additional issues surround alternative bases upon which the Trial Court could have reached its ultimate result which the Bank claims was correct. First, the Bank asserts that Barker Building's misrepresentation claim also should have been dismissed based on the Statute of Frauds. The Bank's second issue is a claim that even though the Trial Court correctly substituted Travelers in its stead because *res judicata* precluded Travelers from raising any defense to the validity of the Performance Bond, the Trial Court nevertheless erred when it refused to take this same action pursuant to Tenn. Code Ann. § 66-11-142.

* * *

In the December 2001 lawsuit seeking injunctive relief, the second lawsuit, Barker Building and Travelers sued the Bank and the Washington County Register of Deeds. In this separate second lawsuit, Barker Building and Travelers noted that in their first lawsuit, the lawsuit now on appeal, they claimed the Subordination Agreement was the result of "misrepresentation by the Bank or mistake." Barker Building and Travelers also alleged: (1) Smith Mechanical filed the other lawsuit to enforce a materialmen's lien and Barker cross-claimed against other defendants, including the Bank, seeking to enforce Barker Building's own lien, (2) the Bank filed a "Bond for Release of Lien" pursuant to Tenn. Code Ann. § 66-11-142; (3) that the Bond was improperly filed pursuant to that statute; and (4) the Bank had given notice of its intent to sell the Hotel free of any liens. Barker Building and Travelers then claimed:

> As long as the alleged BOND FOR RELEASE OF LIEN improperly remains on record, any sale of the Hotel Property to a third party may result in the full and complete loss of the Smith lien and both Travelers and Barker (sic) rights will be violated and both will be immediately and irreparably injured or damaged, because both Barker and Travelers, upon payment of any amount to Smith, will be deprived of their right to subrogate to Smith's lien position against any subsequent owner of the Hotel Property. Barker has agreed to indemnify Travelers against any loss.

Barker Building and Travelers sought a temporary restraining order preventing the sale of the property free and clear of any liens "until such liens either are satisfied or bonded off in accordance with Section 66-11-142 TCA". Alternatively, Barker Building and Travelers sought an injunction requiring the Bank to pay any proceeds from the sale of the Hotel into court "pending a full and complete hearing of the merits…." The final request for relief was an injunction ordering the Register of Deeds to expunge the Bond for Release of Liens from the County's records.

As noted previously, after the second lawsuit was filed, the United States Bankruptcy Court entered an order in November of 2001 which modified the automatic stay and directed the Bank to proceed with the foreclosure sale. Following entry of the order in Bankruptcy Court, Barker Building and Travelers acknowledged that the only relief they sought in the second lawsuit which survived the Bankruptcy Court's ruling was their request for an injunction seeking expungement of the Bond for Release of Liens. In January of 2002, the Trial Court entered an order denying the request for injunctive relief and dismissing that action "in its entirety." No appeal was taken.

In March of 2002, the Bank filed a motion to dismiss in the case now on appeal seeking dismissal of the entire cross-claim filed against it by Barker Building and Travelers. The Bank claimed the dismissal of the separate lawsuit seeking injunctive relief operated to bar the cross-claims pursuant to the doctrine of *res judicata*. A hearing was held in August of 2002 after which the Trial Court entered an order granting the motion to dismiss. The Trial Court's order as it relates to the *res judicata* defense simply states that "the doctrine of *res judicata* operates to bar all claims by Barker and Travelers Casualty & Surety Company of America against First Tennessee…."

In *Lien v. Couch*, 993 S.W.2d 53 (Tenn. Ct. App. 1998), this Court discussed various aspects of the doctrine of *res judicata*. We stated:

> Res judicata is a claim preclusion doctrine that promotes finality in litigation. *See Moulton v. Ford Motor Co.*, 533 S.W.2d

295, 296 (Tenn. 1976); *Jordan v. Johns*, 168 Tenn. 525, 536-37, 79 S.W.2d 798, 802 (1935). It bars a second suit between the same parties or their privies on the same cause of action with respect to all the issues which were or could have been litigated in the former suit. *See Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 459 (Tenn. 1995); *Collins v. Greene County Bank*, 916 S.W.2d 941, 945 (Tenn. Ct. App. 1995).

Parties asserting a res judicata defense must demonstrate that (1) a court of competent jurisdiction rendered the prior judgment, (2) the prior judgment was final and on the merits, (3) the same parties or their privies were involved in both proceedings, and (4) both proceedings involved the same cause of action. *See Lee v. Hall*, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990). A prior judgment or decree does not prohibit the later consideration of rights that had not accrued at the time of the earlier proceeding or the reexamination of the same question between the same parties when the facts have changed or new facts have occurred that have altered the parties' legal rights and relations. *See White v. White*, 876 S.W.2d 837, 839-40 (Tenn. 1994).

The principle of claim preclusion prevents parties from splitting their cause of action and requires parties to raise in a single lawsuit all the grounds for recovery arising from a single transaction or series of transactions that can be brought together. *See Bio-Technology Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1563 (Fed. Cir. 1996); *Hawkins v. Dawn*, 208 Tenn. 544, 548, 347 S.W.2d 480, 481-82 (1961); *Vance v. Lancaster*, 4 Tenn. (3 Hayw.) 130, 132 (1816). The principle is subject to certain limitations, one of which is that it will not be applied if the initial forum did not have the power to award the full measure of relief sought in the later litigation. *See Davidson v. Capuano*, 792 F.2d 275, 279 (2d Cir. 1986); *Carris v. John R. Thomas & Assocs., P.C.*, 896 P.2d 522, 529-30 (Okla. 1995); *see also Rose v. Stalcup*, 731 S.W.2d 541, 542 (Tenn. Ct. App. 1987) (holding that a subsequent action was not barred because the initial court did not have jurisdiction over the claim). Thus, the Restatement of Judgments points out:

> The general rule [against relitigation of a claim] is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under

> applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.
>
> Restatement (Second) of Judgments § 26(1)(c) cmt. c (1982)….

Lien v. Couch, 993 S.W.2d at 55-56. *See also Ostheimer v. Ostheimer*, No. W2002-02676-COA-R3-CV, 2004 WL 689881, at *5 (Tenn. Ct. App. Mar. 29, 2004), *no appl. perm. appeal filed* ("[C]laim preclusion bars any claims that 'were or could have been litigated' in a second suit between the same or related parties involving the same subject matter.").

* * *

Not surprisingly, applying these general principles to this case is not an easy task. On appeal, Barker Building and Travelers admit in their brief that the dismissal of the second lawsuit "operated as an adjudication upon the merits. It served to bar a suit for relief on the same subject matter." Barker Building and Travelers also state:

> Barker recognizes the doctrine of *res judicata* and its elements. Barker does not contest that the injunctive lawsuit involved some of the same parties that it had asserted causes of action against in the Smith lawsuit. It is also acknowledged that the dismissal of its injunction lawsuit was before a court of competent jurisdiction with regard to the sole relief sought by Barker, a temporary injunction. Clearly, finding no grounds to support the temporary injunction, the Court dismissed the lawsuit. The dismissal became final and under *T.R.C.P.* 41 was on the merits.

The main argument by Barker Building and Travelers as to why there is no *res judicata* effect from the second lawsuit is that the underlying event (i.e., the filing of the Performance Bond) and the corresponding relief sought in the second lawsuit were distinct from what was at issue between these same parties in the first lawsuit. We disagree.

The claims between the parties to this appeal arise out of the Subordination Agreement and assurances allegedly made to Barker Building which it relied upon when entering into that agreement and which further caused Barker Building to obtain the Performance Bond from Travelers in order to protect its subcontractors from any possible impact the Subordination Agreement might have on their liens.

Any claims which were *or could have been* litigated between the parties involving this underlying transaction should, therefore, have been brought together. This would include any and all claims by Barker Building and/or Travelers challenging the validity of the Subordination Agreement and/or the Performance Bond. To hold otherwise would allow Barker Building and Travelers to file a lawsuit against the Bank challenging the validity of the filing of the Performance Bond and, if that did not work, then to file another lawsuit against the Bank challenging the validity of the Performance Bond via claims of misrepresentation, and so on and so on.

The vast majority of any claims by Barker Building and/or Travelers against the Bank challenging the validity of the Subordination Agreement and the Performance Bond were at issue in the first lawsuit, including the claims for fraud or misrepresentation involving the closing. Once Barker Building and Travelers learned that the Bank had filed the Performance Bond, any challenge to that event could and should have been filed in the same first lawsuit. The Bank's filing of the Performance Bond pursuant to Tenn. Code Ann. § 66-11-142 was simply one more step in the series of closely related and interconnected events and transactions giving rise to the first lawsuit. The Bank's filing of the Performance Bond was not something that was so independent from the events giving rise to the first lawsuit that it would properly permit the filing of an altogether new lawsuit.

What we have then is two distinct lawsuits, but under applicable law each of these lawsuits should have included all of the claims which were or which could have been litigated between the parties on the same cause of action. The issue is whether the present lawsuit now on appeal involves claims which could and should have been litigated in the second lawsuit which went to final judgment. As set forth previously, the second lawsuit contains the following paragraph:

> As long as the alleged BOND FOR RELEASE OF LIEN improperly remains on record, any sale of the Hotel Property to a third party may result in the full and complete loss of the Smith lien and both Travelers and Barker (sic) rights will be violated and both will be immediately and irreparably injured or damaged, because both Barker and Travelers, upon payment of any amount to Smith, will be deprived of their right to subrogate to Smith's lien position against any subsequent owner of the Hotel Property. Barker has agreed to indemnify Travelers against any loss.

It would defy logic and reason to hold that the claims against the Bank in the second lawsuit are separate and distinct from the claims in the first lawsuit.

* * *

> We conclude that once the judgment on the merits became final in the second lawsuit seeking injunctive relief, the doctrine of *res judicata* through the principle of claim preclusion operates to bar any claims involving the same cause of action which were or could have been brought by Barker Building and Travelers against the Bank in that same action. This includes any claims against the Bank challenging the validity of the Subordination Agreement and Performance Bond. Admittedly, this is a harsh result, but to hold otherwise would require us to ignore the fact that there has been a separate lawsuit involving the same cause of action between these same parties arising from a single transaction or series of transactions which was disposed of on the merits with a judgment that has long since become final. It also must be remembered that it was the affirmative action of Barker Building and Travelers in filing the second lawsuit which results in this outcome.
>
> Barker Building and Travelers attempt to circumvent any *res judicata* effect of the second lawsuit by claiming they really should not have filed the second lawsuit because they lacked standing to do so until Smith Mechanical's lien was satisfied via the Performance Bond. They make this argument even though they previously admitted, and quite properly so, that the Trial Court in the second lawsuit had subject matter jurisdiction and there otherwise was no barrier to the Trial Court's granting any type of relief requested. We do not believe it appropriate to disregard the *res judicata* effect of a final judgment on the merits because years later the plaintiffs in that action now claim that they really should not have filed that lawsuit to begin with. The short answer to that argument is that they did, and an alleged lack of standing by the plaintiffs is not a proper basis upon which to allow those same plaintiffs later to challenge the validity of the second lawsuit. We again note that to the extent the second lawsuit should not have been filed as a separate lawsuit, Barker Building and Travelers are responsible for that error and any attendant effects arising therefrom.
>
> We affirm the judgment of the Trial Court dismissing all of Barker Building's and Travelers' claims against the Bank because these claims are barred by *res judicata*. In light of this holding, all remaining issues raised by the parties are rendered moot.

Smith Mech., 210 S.W.3d at 559-568.

After settling with Smith Mechanical but before *Smith Mech.* went to final judgment, Travelers filed another lawsuit against the Bank and Lawyer's Title, who had insured the first lien status of the Bank's deed of trust on the Hotel. It is this lawsuit now before us on appeal. In this new lawsuit, Travelers sought, in part, a declaration that Smith Mechanical's mechanic's lien had priority over the Bank's deed of trust, and a judgment in favor of Travelers as subrogee of Smith

Mechanical against Lawyer's Title for the unpaid balance due for work performed by Smith Mechanical[1]. Lawyers Title and the Bank moved to dismiss and/or for summary judgment.

The Trial Court held a hearing and then entered its order on April 26, 2007 finding and holding, *inter alia*:

> ORDERED, ADJUDGED and DECREED that this action is dismissed in its entirety with prejudice in favor of First Tennessee and Lawyers Title for the following reasons:
>
> (a) Plaintiff's Complaint is barred under the doctrine of *res judicata*;
> (b) Plaintiff's Complaint is barred under the compulsory counterclaim rule pursuant to Rule 13.01 of the Tennessee Rules of Civil Procedure;
> (c) Plaintiff's Complaint is barred because Tennessee law prohibits a surety/insuror (sic) from having subrogation against its own insureds/obligees;
> (d) Plaintiff never acquired the mechanic's lien rights of Smith Mechanical Contractors, Inc. because Smith Mechanical did not assign those rights to Plaintiff under its Release and Indemnity Agreement such that Smith Mechanical's mechanic's lien rights expired, were waived and/or released by the actions of Smith Mechanical and/or Plaintiff, resulting in this Court having no mechanic's lien before it to adjudicate the validity, extent, priority and amount of any such lien; and
> (e) When First Tennessee recorded the Payment Bond the subject of this action in the Register's Office for Washington County, Tennessee in April 2001, recordation of that bond discharged Smith Mechanical's mechanic's lien from the real property, removing any issue of validity, extent, priority or amount for determination by this Court.

Travelers appeals to this Court.

Discussion

Travelers raises five issues on appeal which we quote:

> 1. The trial court erred when it applied the doctrine of *res judicata* to find that Appellant in its capacity as subrogee was, as a matter of law, prevented from pursuing a cause of action held by its subrogor.
> 2. The trial court erred when it held under the compulsory counterclaim rule that the Appellant in its capacity as subrogee was, as a matter of law, prevented from pursuing a cause of action held by its subrogor.

[1] Travelers moved at some point to amend its complaint to add Barker Building as a defendant, however, it is unclear from the record before us whether Barker Building ever was added. It is immaterial to the issues on appeal whether Barker Building ever was added as a party to this suit and Barker Building is not involved in this appeal.

3. The trial court erred when it found that as a matter of law the Release and Indemnity Agreement of subrogor did not contain an assignment of subrogor's claim to the subrogee and that such assignment was required for the subrogee to pursue an equitable subrogation cause of action against Lawyer's Title Insurance Corporation.
4. As a matter of law the subrogor's claim against Lawyer's Title Insurance Corporation expired, was waived or released by undefined acts of the subrogor or subrogee as to have extinguished the subrogor's claim against Lawyer's Title Insurance Corporation.
5. Having once found that the recording of the subrogee's payment bond with the Register of Deeds was not shown, as a matter of law, to have satisfied the requirements of T.C.A. § 66-11-142 as to warrant summary judgment against subrogor's mechanic's lien claim, and, without any additional evidence being offered, the trial court erred in finding, as a matter of law, such recording did in fact cause the discharge of the subrogor's lien.

Lawyer's Title and the Bank raise two additional issues which we quote:

I. Whether the trial court also should have dismissed this action because Travelers cannot maintain an action for subrogation where it has failed to pay the entire debt?
II. Whether the trial court also should have dismissed this action because Travelers failed to state a claim for relief against Lawyers Title for subrogation where Lawyers Title's only obligations were for perfected mechanics' liens ahead of First Tennessee's deed of trust, and no lien priority has ever been established?

In addition, Lawyer's Title and the Bank ask this Court to find this appeal frivolous and sanction Travelers "because this action is clearly designed to harass, overburden and needlessly increase litigation costs and expenses …."

The Trial Court's Final Order holds that the case should be dismissed for failure to state a claim upon which relief can be granted under Tenn. R. Civ. P. 12.02(6). However, it appears from the record before us on appeal that the Trial Court considered matters outside the pleadings in support of the motion to dismiss. Given this, the motion is correctly treated as one for summary judgment. Tenn. R. Civ. P. 12.03.

Our Supreme Court has described the process for reviewing a trial court's grant of summary judgment as follows:

> The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. *See Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South*, 816

> S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. *See Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991). When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See Byrd v. Hall*, 847 S.W.2d at 215.

Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 88 (Tenn. 2000).

We address the issues as to the Bank and as to Lawyer's Title separately, beginning with the Bank. Travelers claims that the Trial Court erred when it applied the doctrine of *res judicata.* We discussed the principle of *res judicata* in our Opinion in *Smith Mech*. as quoted above.

During the pendency of the *Smith Mech.* case, Smith Mechanical executed a Release in Full of All Claims and Agreement to Indemnify ("Release"), which assigned some of Smith Mechanical's rights to Travelers. At that time, those rights assigned by Smith Mechanical to Travelers became Travelers' rights. Travelers, thus, had the right to pursue those claims in *Smith Mech.* Travelers admits that Smith Mechanical raised issues regarding the validity of the Performance Bond in the *Smith Mech.* case prior to Smith Mechanical executing the Release. When Smith Mechanical assigned its mechanic's lien rights to Travelers, it became Travelers' right to pursue those claims. Travelers, however, chose not to pursue those claims in *Smith Mech*. Instead, Travelers filed a separate lawsuit, the suit now before us on appeal. Unfortunately for Travelers, *Smith Mech.* went to final judgment before the suit now before us on appeal. As we discussed in *Smith Mech.*:

> [Travelers] needed to bring all the claims that could have been brought against the Bank on that cause of action at that time in order not to split their cause of action. In other words, Barker Building and Travelers needed to bring against the Bank in one lawsuit all of its various claims, including its request for injunctive relief, arising out of the Subordination Agreement and the Performance Bond, etc. If we were to excuse Barker Building and Travelers from doing just that because of the pendency of many of these claims in the first lawsuit, then the Trial Court and this Court would have to altogether ignore the fact that there is a final judgment on the merits in the second lawsuit.

Smith Mech., 557 S.W.3d at 567.

What Travelers did by filing the lawsuit now before us on appeal is again attempt to split its cause of action against the Bank. Once *Smith Mech.* became final on the merits, the doctrine of *res judicata* through the principle of claim preclusion operated to bar any claims involving the same cause of action which were or could have been brought by Travelers against the Bank in that same action whether those claims were brought by Travelers in its own right or by Travelers as subrogee of Smith Mechanical. This includes any claims against the Bank challenging the validity of the Performance Bond. As we stated in *Smith Mech.* when we held that Travelers' claims in its own right were barred by *res judicata* as a result of the injunction lawsuit, this is a harsh result, but to hold otherwise would require that we ignore the fact that there has been a separate lawsuit involving the same cause of action between these same parties arising from a single transaction or series of transactions which was disposed of on the merits with a judgment that has long since become final. It was the affirmative action of Travelers in filing the new lawsuit, the one now before us on appeal, and the failure of Travelers to pursue its rights to litigate the claims assigned to it by Smith Mechanical in the *Smith Mech.* case, which results in this outcome. We hold that Travelers' claims against the Bank, including those assigned to Travelers by Smith Mechanical, are barred by *res judicata*.

We now consider the issues raise by Travelers with regard to Lawyer's Title. In the appeal now before us, Travelers claims, among other things, that Lawyer's Title cannot claim the benefit of *res judicata* because Lawyer's Title was not a party to the preceding two lawsuits. However, Lawyer's Title seeks to employ *res judicata* through the doctrine of defensive collateral estoppel. As this Court discussed in *Trinity Indus., Inc. v. McKinnon Bridge Co., Inc.*:

> Collateral estoppel, an issue preclusion doctrine, was devised by the courts to "conserve judicial resources, to relieve litigants from the cost and vexation of multiple lawsuits, and to encourage reliance on judicial decisions by preventing inconsistent decisions." *Beaty v. McGraw*, 15 S.W.3d 819 at 824 (Tenn. Ct. App. 1998). The doctrine bars the parties or their privies from relitigating issues that were actually raised and determined in an earlier suit. *Id*.
>
> Collateral estoppel may be used by a defendant in the second suit (defensive collateral estoppel), or it may be used by a plaintiff in a second suit (offensive collateral estoppel). In Tennessee the offensive use of collateral estoppel requires that the parties be identical in both actions. *Beaty v. McGraw*, 15 S.W.3d 819 (Tenn. Ct. App. 1998); *Algood v. Nashville Machine Co*., 648 S.W.2d 260 (Tenn. Ct. App. 1983). Without saying so specifically, however, Tennessee has not required party mutuality in applying defensive collateral estoppel. In *Phillips v. General Motors*, 669 S.W.2d 665 (Tenn. Ct. App. 1984), the court said that different parties are in privity if they stand in the same relationship to the subject matter of the litigation. *Id*. at 669. *See also Shelley v. Gipson*, 218 Tenn. 1, 400 S.W.2d 709 (1966). Thus, a plaintiff who sued an automobile dealer for a defective car and lost could not then sue the manufacturer on an identical claim. *Cantrell v. Burnett & Henderson Co.*, 187 Tenn. 552, 216 S.W.2d 307 (App. 1948). The judgment in the first case that the

> car was not defective precluded the plaintiff from asserting that the car was defective in an action against the manufacturer.
>
> Even if the parties do not have to be identical for the application of defensive collateral estoppel, the issue sought to be precluded must be identical in both cases. *Beaty v. McGraw*, 15 S.W.3d 819 (Tenn. Ct. App. 1998); *Tennessee Farmers Mut. Ins. Co. v. Moore*, 958 S.W.2d 759 (Tenn. Ct. App. 1997); *Scales v. Scales*, 564 S.W.2d 667 (Tenn. Ct. App. 1977).

Trinity Indus., Inc. v. McKinnon Bridge Co., Inc., 77 S.W.3d 159, 185 (Tenn. Ct. App. 2001).

The issue sought to be precluded in this instance is the issue regarding the validity of the Performance Bond. Lawyer's Title is in privity with the Bank with regard to this issue. Given this and the fact that the issue sought to be precluded went to final judgment on the merits in *Smith Mech.* as discussed above, Lawyer's Title can utilize defensive collateral estoppel. We hold that *res judicata* bars Travelers' claims against Lawyer's Title for the same reasons that *res judicata* bars Travelers' claims against the Bank.

While our decision that *res judicata* bars Travelers' claims against the Bank and Lawyer's Title is dispositive of this appeal, and the validity of the Performance Bond cannot now be contested by either Travelers in its own right or Travelers as subrogee of Smith Mechanical, we will address, in the interest of completeness, whether the Trial Court erred in finding that the recording of the Performance Bond discharged Smith Mechanical's mechanic's lien. As pertinent to this issue, Tenn. Code Ann. § 66-11-142 provides:

> **Tenn. Code Ann § 66-11-142. Bond to discharge lien. –** (a) If a lien, other than a lien granted in a written contract, is fixed or is attempted to be fixed by a recorded instrument under this chapter, any person may record a bond to indemnify against the lien. Such bond shall be recorded with the register of deeds of the county in which the lien was filed.…The recording by the register of a bond to indemnify against a lien shall operate as a discharge of the lien.…

Tenn. Code Ann. § 66-11-142 (1999).

As discussed above, the Performance Bond was recorded. Under the statute, this recording operated to discharge Smith Mechanical's mechanic's lien. We find no error in the Trial Court's holding that the recording of the Performance Bond "discharged Smith Mechanical's mechanic's lien from the real property, removing any issue of validity, extent, priority or amount for determination by this Court."

Our determination renders Travelers' remaining issues moot and pretermits the necessity of considering the issues raised on appeal by Lawyer's Title and the Bank. In the exercise of our discretion, we decline to hold this appeal frivolous.

There are no disputed material issues of fact and Lawyer's Title and the Bank are entitled to judgment as a matter of law. Given this, we affirm the Trial Court's Final Order.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Travelers Casualty & Surety Company of America as subrogee of Smith Mechanical Contractors, Inc., and its surety.

_____

D. MICHAEL SWINEY, JUDGE